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Medical Involvement in Acts of Torture or Degrading Treatment of Human Beings: Forensic and Medical Reflections

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Abstract

The following chapter condenses the reflections about the legitimacy of torture, a theme that the authors hope to contribute to in the opening of a debate on this important issue for the future of medicine and for the goals that medicine sets for itself in our time. The topic of this article is relevant to the debate exacerbated by the tragic events of 2001. In the case of capture of terrorists in possession of information regarding imminent attacks, is it permissible to subject them to torture? In what situations and under what conditions is it possible? We will report on the requirements of the critics of the international ban and the justifications for their arguments. We will present the criticisms of those who defend the maintenance of the prohibition of torture. Similarly we will discuss the positions of doctors who are favorable and adverse to participation in procedures of torture.

Keywords: Torture, Medicine, Terrorism, Utilitarianism, Doctors, Attack, Slippery slope principle, Human rights

1. Introduction

The recent controversies regarding the Regeni case (an Italian student who died after being cruelly tortured in Egypt [1]) and the pro-torture statements by a Republican candidate [2] participating in the American presidential primaries show how the issue is more than ever present and relevant. After the September 11 attacks in New York by Osama Bin Laden, as well as those committed by ISIS in London and in Madrid, or even in union with ISIS in Paris, many of our habits as citizens of the Western world in the third millennium have changed. Due to

these terrible terrorist attacks, it seems to be licit to ask whether it is permissible to submit captured terrorists who are most certainly in possession of information on future attacks to torture. In addition to reporting the general positions in favor of and against this general situation [3], we are also going to examine the pros and cons of the participation of physicians in these acts, because this implies a conflict between two needs: firstly, that of safeguarding the constitutionally protected value of health and well-being and secondly that of protecting the safety of citizens imposed upon by the war against terrorism. The physicians are not exempt from conflicting theories regarding his/her role as a therapist and his/her position in the state in organizations such as the army; we must also not forget the delicate correlation between medicine and society. We consider it essential to quote a part of the international legislation regarding the definition of torture before examining individual positions about medical participation in torture or inhuman, cruel, and degrading acts.

Faced with this situation, in the fight against so-called urban jihadism represented by “lone wolves” and the “sleepers cells” who are ready to go into action, supervising airports or closing national borders and even dramatically enhancing the supervision of several thousands of sensitive targets may no longer be enough. No place is safe anymore. Therefore the need to fight this new enemy with different weapons could be recognized. Technological high-grade espionage, killing hostile enemies with highly specialized military units or with the use of remote-controlled missiles or drones, continuous controls at borders, and protection of scientific research may also have applications related to national security. The search for possible internal enemies (sleepers cells) with measures that are usually used in the field of counterintelligence, the establishment of detention camps for suspected terrorists, and resorting to special judiciary procedures are all tools that are normally used by the executive international power against an external military threat and that now must be used against an alleged internal enemy.

2. International and supranational legislation

The General Assembly of the United Nations approved the Universal Declaration of Human Rights in 1948. In Article 5 it is stated that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” [4].

In this article a specific definition about what could be identified as *inhuman and degrading treatments* and which types of obligations the individual members of the UN have is missing.

An initial definition of torture was provided by the General Assembly’s *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in 1975. Article no 1 defines the torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons” [5].

Another binding document for the signatory states is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which was put in place on 26 June 1987 (in the international legal language, a convention is binding on the signatory states; this is not true for a declaration). As regards the definition of torture, it replicates the previous declaration of 1975 [6]. In addition, also the *Rome Statute of International Criminal Court* (1998) defines torture replicating that in declaration of 1975 [7].

International legislation has also taken on the issue of the binding nature of the ban; therefore, neither exceptions nor extenuating circumstances subsist. This has been confirmed by many international documents approved by the United Nations General Assembly: article 3 of the *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1975; article 7 of the *International Covenant on Civil and Political Rights* of 1976, in the *Standard Minimum Rules for the Treatment of Prisoners* of 1977, in the *Code of Conduct for Law Enforcement Officials* of 1979; article 6 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* of 1988; and finally article 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

On a European level the *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR [8]) of 1950 not only confirmed the prohibition of torture and humiliating or degrading treatments, but also it established its absoluteness, which cannot be undermined, neither by the law nor by a state of emergency.

In resolution no 690 of the *Declaration on the Police*, the Parliamentary Assembly of the Council of Europe in 1979, in article 3—Appendix 1, Ethics—cites that “summary executions, torture and other forms of inhuman or degrading treatment or punishment remain prohibited in all circumstances. A police officer is under an obligation to disobey or disregard any order or instruction involving such measures” [9].

The binding nature of the prohibition of torture was later confirmed in article 16.3 of the *Copenhagen Conference* by the member states in 1990. Regarding the American continent, both the *American Declaration on the Rights and Duties of Man* of 1948 and the *American Convention on Human Rights* of the 1978 reaffirm the prohibition. The *Inter-American Convention to prevent and punish torture* in article 4 affirmed: “The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability” [10]. From the same convention, article 5 reiterates that “The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture” [10].

3. The definition of torture: some reflections

After examining torture and degrading treatments in terms of international law, we should ascertain their characteristics: the first distinctive feature of torture concerns the active nature

of the process or the omission of offering relief from that which causes severe distress or pain, including both the physical and mental consequences of violent actions; the intention of the act, that is, the will of the perpetrator of the crime to intentionally inflict pain and suffering on his/her victims; and the pursuit of a specific purpose: i.e., to obtain information, punish, intimidate, and discriminate. There is also a purpose of torture, which is not explicitly mentioned in the legislation, i.e., to prevent conduct that is contrary to the current political powers that be. In dictatorial regimes, in fact, political opponents are tortured to death in order to send a strong message of deterrence; the role of the public authorities is to represent the perpetrator, i.e., a person with powers authorized by the state: "Enemies are tortured mercilessly for information and then killed. Political opponents are tortured to death to send a powerful deterrent message" [11]. The distinction between torture and inhumane, cruel, humiliating, and degrading treatment concerns primarily the nature of the act, which in turn concerns the intensity of the pain inflicted: "The degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed" [12]. The analysis of the norms allows for the theory that the definitions of torture and degrading treatment are unique in that certain acts, behaviors, or events may fall within the definition of torture in certain circumstances, or in other situations may not be included, depending on the presence or not of the four elements necessary for the above-presented definition.

Therefore the following statement appears to be relevant: "Torture is not an act in itself, or a specific type of act, but it is the legal qualification of an event or behavior, based on the comprehensive assessment of this event or behavior. [...] It is clear that [...] the qualification of torture may be easily granted in certain cases. However, in some others, the vulnerability of the victim (age, gender, status, etc), as well as the environment and the cumulative effect of various factors, should be taken into account to determine whether this case amounts to torture or whether it does not reach this ultimate threshold and should be considered as cruel, inhuman or degrading treatment or punishment" [13]. This allows a pragmatic and non-descriptive approach, which at first sight may seem disadvantageous because there is no detailed statement about conduct defined as torture, or degrading or inhuman acts, but which allows including into the definition acts which were not even taken into consideration by the legislature at the time when the norm was written.

By international law, the "mark of Cain" regarding a particular episode of torture would be the utter helplessness of the victim: "Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation where the victim is powerless i.e. is under the total control of another person. [...] The decisive criteria for distinguishing torture from cruel, inhuman or degrading treatment may best be understood to be the purpose of the

conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars" [14].

4. Favorable positions and the requirements

Those who are in favor of torture are aware of its extreme gravity and limit its use to specific situations, in which a primary objective is at stake—the safety of people. To determine the security of a nation's citizens could be useful recognize the torture, with a previously established legal procedure as "the only way to prevent the bomb from exploding and killing large numbers of civilians" [15]. Thus it becomes ethically legitimate and justified from a legal point of view.

4.1. The interrogation of those who have useful information

Torture must be applied to very specific subjects, who have been ascertained to be in possession of information regarding imminent serious danger. In these cases only the terrorist is to be submitted; few specialists accept the possibility of submitting family members to torture [16]. Most scholars exclude "indirect" measures of this type as they are incompatible with the demands of democracy, which views penal responsibility as strictly personal: "What if it were necessary to torture the suspect's mother or children to get him to divulge the information? What if it took threatening to kill his family, his friends, his entire village? Under a simple-minded quantitative case utilitarianism, anything goes as long as the number of people tortured or killed does not exceed the number that would be saved. This is morality by numbers, unless there are other constraints on what we can properly do. These other constraints can come from rule utilitarianism or other principles of morality, such as the prohibition against deliberately punishing the innocent" [17]. There is a risk to fall down a slippery slope toward the amorality without some limits about the use of torture or other degrading treatments.

In fact, they claim that the application of torture is only against a directly involved subject and against whom they have sufficient evidence that he/she is involved. The subject must be in possession of relevant and necessary information. On this last point, there is a general agreement even though it is unclear how it can be inferred that the person actually possesses that information [16]. This most certainly should be based on the findings from the judicial inquiry [18]. It should be the preponderance of the evidence gathered by investigators which determines the possibility of resorting to torture: "Torture should be permitted where the application of the variables exceeds a threshold level. Once beyond this level, the higher the figure the more severe the forms of torture that are permissible" [19].

4.2. The saving of lives in emergency situations

The saving of lives in emergency situations finds two forms of expression, the most dramatic of which is the ticking bomb scenario (a situation often cited by the defenders of torture). In literature there are variations, but the concept is almost always the fact that a significant

number of lives are at stake and thus there is the need to torture the terrorist who knows where the bomb may be: "What do we do? [...] Torturing the terrorist is unconstitutional? Probably. But millions of lives surely outweigh constitutionality. Torture is barbaric?" [20].

This is a theoretical situation in which the existence of a specific society is in danger. In these cases it is not only the loss of human lives the only factor that should be considered but also the great danger that threatens the existence of a State, a community and A culture [21].

The other form of the ticking bomb scenario, which could be called *minor*, involves instead the capture of a terrorist in possession of information regarding imminent attacks, of a nonnuclear nature or with no weapon of mass destruction, in which many people would perish. Unlike before the very existence of a country is not at stake, but only an unspecified considerable loss of life, which is a much less dramatic situation than a nuclear attack.

Instead, in the military setting, the supreme emergency situation is usually defined in relation to the requirements more closely related to possible conflicts also unconventional in progress: "If the unit is a major command, and its being destroyed would cause the war to be lost, this might be considered the supreme emergency addressed earlier" [22].

4.3. Strict rules which are to be observed

The rigid control of the judiciary apparatus regarding the warrant for torture and the public debate should avoid degeneration, giving public legitimacy to something which, if left in secret, could lend itself to serious and unacceptable abuses: "*Off-the-book actions below the radar screen* are antithetical to the theory and practice of democracy" [23].

According to Dershowitz, the use of the presidential mandate should aid in the prevention of the overstepping of the boundaries between torture and abuse, on the basis of the incompatibility of the said abuse with democratic values: "The rights of the suspect would be better protected with a warrant requirement. He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so, and given the option of providing the requested information. Only if he refused to do what he was legally compelled to do – provide necessary information, which could not incriminate him because of the immunity – would he be threatened with torture" [24].

It should ensure both the judicial protection and the public accountability for the actions of security forces, with the additional protection against abuse, and the *redde rationem* to public opinion, which should be always taken into account by any executive who wants to act in the spirit of the constitution.

4.4. The infliction of intense pain while avoiding permanent damage

Defenders of the use of torture against a terrorist who is uncooperative with the investigation do not go into a lot of detail on what form of pressure is applied. They look at the issue of pain not in legal and ethical terms, but from a pragmatic point of view. Only Dershowitz is quite explicit on the subject. He uses the example of the use of sterile needles under fingernails, based on the maximum sentence principle, i.e., minimum lethality, so as to cause an agonizing pain,

intense and immediate, but without leaving permanent psychological and physical harm: “the use of nonlethal torture [as] a sterilized needle insert under the fingernails to produce unbearable pain without any threat to health or life, or the method used in the film *Marathon Man*, a dental drill through an unanesthetized tooth” [25].

4.5. The justifications

4.5.1. *Lesser evil theory*

The theories of authors who favor legal and nonlethal torture, such as Dershowitz, are based on currents of thought that could be defined as the “lesser evil”: “the question of the lesser evil seems to be the need to choose, as in those situations where the options are, or appear to be, limited and constrained by a great power. The dilemma involves a closed system in which the options available for the choice [...] cannot be questioned” [26]. The first characteristic of the lesser evil theory is that it is a justified exception to the general moral principle that one should never commit evil acts. One must keep in mind one thing, evil is chosen anyway [27]: “Torturing someone to divulge terrorist actions is wrong, no matter what useful information is extracted, and hence no democracy should ever have anything to do with torture. [...] But this style of interrogation [though nonphysical] which would push suspects to the limits of their psychological endurance, would remain a violation of their dignity. It would be a lesser evil than allowing thousands of people to die, but its necessity would not prevent it from remaining wrong” [28]. And we should be aware that someone will have to suffer and that if that person does not pay, it will be someone else. Claiming that it is necessary to restrict the rights of citizens in exchange for security and then placing the responsibility on those whose rights have been restricted are taking a position which is understandable yet hypocritical, as the costs of choosing an evil, albeit minor, should be borne by the person who made that choice, i.e., the responsibility for those choices can only fall on the shoulders of those who have embarked on that specific path.

4.5.2. *The rights*

The fight against terrorism also poses problems in terms of human and civil rights in emergency situations: “Rights that stand in the way of a regime’s survival should be suspended in a time of crisis” [29].

Only in this manner can the government properly manage its monopoly on legitimate violence and overcome the threat to its very existence. Our society is based on the principle of respect for the rights that the individual holds as a person and citizen. Problems arise when the rights of the individuals clash with those of society, and it is necessary to find a balance between them.

A conflict would be between the rights of the few (especially the right to dignity) and the right to life of many people (self-defense). We must never forget the importance of utilizing a proportionality test when it comes to citizens’ rights to protection and national security and finding a compromise or a balance of values: “An ethics of balance cannot privilege rights above

all, or dignity above all, or public safety above all. [...] They are all important principles – all must be weighed in the balance equally – and nothing trumps” [30].

This argument in favor of legal torture is based on the *extrema ratio* thesis: “In the face of extreme situations, we are quite ready to accept that one should, or even must, sacrifice oneself or *others* for the good of the whole” [31].

A democratic president to whom torture is repugnant is however in the situation of being able to order acts according to a utilitarian calculus where the possible consequences of these actions can be decisive in making us lean toward one behavior rather than another: “If the leader believes he has simply weighed the alternatives and calculated that the consequences of torturing are better than those of not torturing, than he has not committed a crime” [32]. Placed between protecting the rights of an individual and those of society, no utilitarian will find the use of torture to be unacceptable [33].

5. Opposing views

Opposite reasons especially underline how torture is not only ungovernable but also infeasible because it jeopardizes the society in its foundations.

5.1. The requirements

The first objection related to the subject of torture is the terrorist. National and international laws prohibit torturing anyone under any circumstances without distinguishing between different categories of enemies. In this sense, the quibbling about whether the person is a terrorist in possession of information, a fighter but not a belligerent, or an illegal combatant does not help anyone [34].

The law also requires the state and its nationals other obligations under certain dangerous situations, including the protection of the innocent. The term should be understood in the etymological sense, i.e., he who does not injure, not only as a synonym of not guilty. This is one of the thorniest issues of torture [35].

Resorting to the principle of asserting that torturing a captured terrorist will save lives is fraud, and the need for us to force the revelation of a secret that the subject is likely to have does not authorize an act of abuse in such a circumstance. In fact an essential element of self-defense is missing: a direct causal relationship such that the action of defense can probably avoid offense [36].

One of the charges most frequently made against supporters of lifesaver torture in emergency situations regards the argument of the “slippery slope”: introducing torture into our system even in exceptional cases would involve a degeneration that eventually would be applied in cases not originally anticipated. It would therefore be impossible to draw a clear line of distinction that would avoid this “slippery slope.” Here we merely point out that it represents the most frequent objection to those who support lifesaving torture [37].

Other criticisms concern the inapplicability of the proposed use of torture in emergency situations to everyday life and in particular in “ticking bomb” situations. In such contexts, one wonders how the model proposed by the defenders of lifesaving torture could prove useful. It is true that the model proposed by Dershowitz on paper looks interesting; because of the demand for public legitimacy, one wonders if the reality of the fight against terrorism would prove to be a trump card compared to the current work of law enforcement and judicial authorities, since it would require a capacity of action and reaction that no government agency in the world has [38].

It should be recognized as evil in itself, without the need for laws which prohibit it or not.

5.2. The justifications

The critique that is made against the argument of the *lesser evil* was effectively analyzed by Hanna Arendt: the weakness of the argument has been always obvious—those who choose evil forget too quickly that they are still choosing evil [39].

The argument of the lesser evil has subtle implications. Who presents it does so already taking everything for granted [40]. But the evil aspect is that they make no attempt to put it on a scale where the consequences may be weighed given the presence of increasingly unpredictable factors which in any case escape the possibility of calculation [41]. Those who do defend the thesis of the lesser evil are now enforcing its manipulation of reality; the only possible solution would be to refuse to submit to the imposition of choice.

Torture in exceptional circumstances would not be possible, because this is one of those situations where the exception does not exist. It presents normal men with a dilemma with no alternative: “We can either defend torture by arguing that interrogational torture will provide us with the kind of counterintelligence we need to prevent catastrophic attacks, in which case we need a practice of torture that is effective, or we can defend an absolute ban on torture” [42]. The complaint against what we might call an intermediate approach to the problem is therefore profound: “The moderate position on torture is an abstraction impractical [...] You can call it torture in the dreamland” [42]. The logic of torture in the interrogation process excludes the exception. If, as has been noted by a critic, today’s world is made of policies, directives, guidelines, and daily practices and not of emergency measures, there is little to do but admit that the exception invalidates the norm: “we cannot justify even the exceptional case of torture without also justifying a torture culture. If we accept torture we will need torture experts, new instruments of torture, torture research, and a pedagogy of torture” [42].

5.3. The rights

Critics of the anti-torture ban observe international law from the wrong point of view, considering it as a forbidden evil rather than evil itself. The anti-torture laws would be enacted to limit actions that could be permitted in the absence of specific rules. On the contrary, torture should be recognized as evil in itself, which is wrong whether there is an active law which prohibits it or not [43].

In this sense they define those who describe the international anti-torture ban as the expression of a legal archetype: “a rule or positive law that transcends an individual law or statute in that it captures the spirit of an area of law” [44].

Another criticism that opponents of the use of explicit torture put forth is its substantial contradiction with democracy, not to mention the irreparable damage [45] caused to the judicial system. The fundamental incompatibility of torture with constitutional values, according to its opponents, manifests itself in the special violence that is done to a person who in the act of torture is reduced to an object, a thing. In this sense, the comparison made with a rape is perfectly fitting [46].

Those who support the admissibility of the use of torture put forward the argument of the state of exception or *Ausnahmezustand*, a concept which is linked to the doctrine of the famous German jurist Carl Schmitt. In his treatise *Political theology* [47], he defined it as a particular situation in which the executive power, in the face of a threat that endangers its very existence (war between states, civil strife, riots, etc.), assumes total control of all areas of society, suspending rights “temporarily and in exceptional cases.” This is not the place for an in-depth analysis of the issue. We just keep in mind what has been written on this subject by a philosopher of our day: Giorgio Agamben. In his critique of Carl Schmitt, he emphasizes how the state of exception is not a “pleromatica” state where you have a plus, but rather a “kenomatica” situation that looks like a minus [48].

During an emergency, *which must necessarily be brief*, citizens must take action to repel the threat to their very existence at a time when the law has been suspended, in which what they do has not yet been evaluated from a legal point of view. Despite this, the constitution, civil rights, and possibly also human rights, even if Agamben does not say so explicitly, remain intact. If the president orders an act of torture, the government can and must answer to the law and public opinion. The exception in itself does not justify it. While that is for Dershowitz and his followers, the exception which justifies it in any case, if the required conditions are met, for Agamben, it should be the Court of Justice to determine, regarding the emergency, if it has acted in accordance with the law or not, with possible legal judgments which will differ from case to case.

Not all utilitarians believe torture to be acceptable. Some point out the consequences of the act in its negative terms, primarily the corrosion of the relationship between the government and the people [49].

Utilitarians against torture even quote the slippery slope argument in its two forms—logical and empirical. The first asserts that once certain practices are accepted, from a logical point of view, one is forced to accept others, in that having once embarked on the first step, there are good reasons to stop. So reason would conclude that since the resulting actions are unacceptable, it follows that it is preferable not to take the first step. From a logical point of view, the slope assumes that the acceptance of X contains an implicit justification of Y, even if Y never arises [50]. The empirical wedge shape provides that once certain activities have been accepted, people are implicitly led to accept others, which are much more problematic. The argument refers to what people will do and not to what they have logically committed themselves to

undertake. This involves an empirical prediction of what will happen. It therefore becomes essential to examine context and mindset, because of the psychological influences that they can exert. In logical reasoning we have an orderly progression of similar facts, while in empiricism the pairing of differing facts can also occur. In the case of torture, the empirical version which predicts that if torture was permissible in some circumstances, this will mean an inclination to use it in other situations cannot be justified [51].

6. The doctor and torture

The doctor has a delicate role, and he risks to be forced into a situation of dual loyalty: the society versus the patient and the ethics of war versus the ethics of peace. Is it possible to put together this dual loyalty? Or is it necessary to define priorities to establish tasks and roles in a coherent manner?

6.1. Favorable positions

The justification of the doctor's participation in torture is based on the different roles that the doctor plays according to the contexts in which he/she operates, such as the war against terrorism, where the parameters of medical ethics are not only being differently interpreted but have even been replaced.

When your doctor participates in an interrogation, he is not acting as a doctor, but as a technician. This is the view expressed by the Bush administration and the Pentagon regarding the scandals of Guantanamo and Abu Ghraib [52]. Since he/she is not operating as a health professional, but as a member of an organization like the Army, the doctor-patient relationship does not apply, and medical ethics traditional strongholds such as confidentiality, beneficence, and non-maleficence are not binding. According to this view, their medical degree is a mere certification of technical knowledge and not a sacred vow [53].

Medical ethics in times of war and in times of peace are different. This is the thesis of M. Gross [54]. Here we offer a brief summary for reasons of space. The principles that guide our ability to make decisions in bioethics in ordinary clinical settings are absent when we are at war.

Considering the principle of self-determination, at least for military personnel, it takes a less incisive value than in an ordinary context. Usually we cannot fight compulsory vaccination by law; a soldier who has to leave for a conflict where the use of biological weapons may be expected does not have the same opportunity [55]. Bioethical principles give way to those governing the contemporary *jus in bello*: government motives, proportionality, the doctrine of double effect. On the one hand, the "government motives" require us to act in ways that bring benefits through its conduct to the greater number of its countrymen, considering the collective interest and not the utility to the single individual: "State interest [...] transcend aggregate utility to include indivisible collective interest – that is, *superaggregate* utility sometimes defined as *reason of state* or a *way of life*" [56]. On the other hand, military necessity, the fact that "government motives" are a product of times of war, plays a vital role in determining the

choices during conflict: “Military necessity functions within particular moral parameters that limit the ends and means of war. Nevertheless, military necessity retains a distinct if not superior status, if only because most individuals gladly weigh the interests of state above their own” [57].

Following Gross’ position, the responsibility of the physician to the entire social body is the central issue. The use of torture requires not only the presence of the doctor but also his consent. *He is not just a performer who obeys external orders; the doctor is an active part in decision-making and must defend his position.* In war, according to this interpretation, the traditional principles of ethics change: the principle of beneficence requires the presence of a doctor during the interrogation as a sort of puppet; thus, the suspect being interrogated could be at risk of harm [58]. Regarding the principle of non-maleficence, one author put it this way: “Physicians must not revive interrogates just so that the interrogates can be tortured even more, ultimately being made the worse off for the physician intervention. [...] First, at least in some cases, torture would not be worse than death. Therefore, resuscitating someone merely so she or he can face more torture does not *necessarily* violate the principle of non maleficence *if*, absent resuscitation, she or he would have been even worse off (e.g., dead)” [59].

6.2. Contrary positions

The military doctor is always and above all a doctor, so much so that the international legislation specifies the particular function of belonging to the army in its entirety as an organization of the state but not as a professional corps. According to the latest Geneva Convention, they are to be considered as administrative personnel and combatants and only exceptionally may resort to violence and only to defend themselves or their patients. Assertions reported on the alleged neutrality of the doctor, on his being a mere technician during interrogation, that is, an “interrogator who is medically trained,” are categorically refuted by the fact that the presence of health personnel is explicitly required to counter the onset of medical problems: a cardiopulmonary arrest one or laryngeal spasm during a session of water boarding [60].

The defenders of the governmental thesis seem to forget that the doctor, although effectively working for state institutions, must act so as to preserve his/her autonomy and professional independence [61].

Even the thesis of Gross whereby medical ethics in wartime is different from that in time of peace is not without its critics: in fact, according to some authors, neglecting the great importance of human rights and forgetting that beyond the contingent situation medical ethics remain are the same thing.

If respect for human rights is a necessary condition to the decency of a country’s political institutions and legal order [62], if torture is a violation of human rights, and if violations of human rights are completely prohibited by international law, then no state or individual can justifiably use or contribute to torture [62].

An approach based on the military doctor as the protector of the patient’s compliance constraints and human rights would present a double advantage: not only would he/she be little

influenced by arguments like “necessities of war,” but it would provide greater protection against the possibility of abuse [63].

In fact, during court martials a line of defense based on the absolute prohibition of torture would help a military doctor to justify his conduct if he disobeyed an order which involves a violation of international treaties on human rights that his country has signed and that, as a citizen and member of the military, he is bound to observe. Such an order would be unlawful, and his disobedience would be perfectly in line with the provisions of all military justice codes and the living law [64].

Medical participation in torture involves the ordinary breaking of trust that people have for the figure of the doctor and the loss of his integrity as a professional and as a person.

In fact, the silence of the doctors in Guantanamo and Abu Ghraib has had many consequences including the loss of confidence in the prison doctors as defenders of human rights [65]. The participation in medical torture would thus result in the destruction of the professional figure of the doctor and his own personal integrity [66].

What happened in the two US prisons might be the worst demonstration of the empirical form of the slippery slope. Critics emphasize that the physicians’ behavior triggered a series of negative events empirically and conferred an aura of legitimacy to abuses, worsening the de facto interrogation situation which the doctor, through his presence, ought to have protected.

Torture therefore shows a tendency to self-expansiveness; that is, it would tend to go easily beyond the limits imposed on it. That fact in itself would make any system built to control it inapplicable. Introducing medical participation in the process would mean setting up ad hoc graduate schools, with instructors, practice tests, and guinea pigs, in order to improve their performance and reduce inefficiency. We live in a world of guidelines and procedures, and in this context, what was established as an exception to the rule would become routine.

7. Conclusion

If torture results in the utter helplessness of the victim, who has lost all capacity of self-determination, the violation of his/her will which often results in a profound splitting of the personality, then the victim becomes an object, a “safe” which is simple to crack.

The mark of Cain of torture, as specified by the UN Special Rapporteur, should be sought in the *utter helplessness of the victim who has lost both his self-determination and dignity* [14]. This definition should be kept in mind in any debate on torture.

If the exceptional nature of the alleged threat “ticking bomb” scenario, apart from the discussions on its alleged unrealistic and excessive nature, entails that evil is still committed, whether human dignity constitutes an absolute principle not comparable with others results in the inability to carry out a balancing of principles though the concept of the lesser gravity of torture with respect to death is absurd, because torture is living and then dying and is worse than death alone [67]: a similar picture appears more in line with those who consider torture evil

in itself and always as a legally punishable conduct even if, for a specific and contingent situation, it is carried out in a country with an approved ad hoc law.

One must however consider that the allegations of torture by supporters of saving lives about its usefulness are more similar to anecdotal than anything statistically credible. Of course, this does not mean that there are no cases where torture has been effective, but that it is not possible to use even proper statistical analysis of the matter to support the use of torture under any conditions.

If it is true that torture can neither be restricted nor professionally used [68] and that it corrupts and erodes any professionalism [69] since it constitutes actual acts of abuse, then any attempts to ask supporters of strict regulations of the phenomenon should be considered a chimerical illusion.

The focal point of the discussion lies in the image of state authority that emerges from the pages of the critics of the international ban. If torture is the utter helplessness of the victim, who has lost all ability to self-determination, the rape of his will which may cause irreparable personality disorder, where the citizen becomes an object, a simple safe to crack, then would such a *Weltanschauung* strengthen or weaken the values of democracy? Should the chief executive respect the constitution, or would it not distort and betray in the name of national security?

In the wake of the ideas of authors like Ignatieff, we believe we should clearly reject torture and admit those forms of coercive pressure, although relatively tough, which in any case interpret the right of the state to use violence as a means to ensure the security of citizens.

Nothing prohibits a government from establishing in peacetime the measures and procedures to be performed in specific exceptional situations of threat, all in compliance with national and international regulations, the prohibition of torture and degrading treatment included.

Only then can the judicial system and the public debate over adherence to established measures with punishment for violations, i.e., pipelines that have exceeded the limits of the terms, decide, once the emergency has passed. In this sense, the exception does not invalidate the general rule because it has not been betrayed, but rather strengthens it, adapting it to a specific context.

Based on what we have said so far, medical participation in torture qualifies not only as a betrayal of the principles of the rule of law and democracy but as a deep “vulnus ethos” of every profession, not only healthcare [70], and thereby provides evidence that the key word with respect to these activities is one and only one: opposition [71]. We believe that the ban should be maintained, and torture and humiliating treatment which are inhumane and degrading should remain prohibited unconditionally, in accordance with most of the literature on the issue.

To strengthen the ban, we align ourselves with the proposal made by some US colleagues for the establishment of an international medical tribunal. This would offset the inherent weaknesses noted in scientific and trade associations and orders, which have proved largely unprepared to deal with the scandal.

An international tribunal would enjoy the support and approval of the UN and would be free from local influences as it would be composed of internationally renowned judges, making it independent of any authorities and political or philosophical thought, and it would have the authority to “investigate allegations of professional misconduct and condemn professionals found guilty of violating norms of professional responsibility” [72]. Albeit with no possibility of imposing criminal penalties, its own power to publicly accuse a culprit of acts of abuse would be a powerful deterrent to grossly unethical conduct through naming and shaming or identify and make the subject of shame.

This court would draw up a code of international conduct and would have the advantage of being able to revoke the professional license of doctors who violate it without those legal restrictions by which national orders can be restricted.

If, for example, a national order cannot sanction the participation of a physician in torture or other acts of abuse because they conform to local law, the court may instead prosecute and convict him and revoke his right to practice that profession whose values have been betrayed. All this without forgetting another important task regarding prevention: the education of future generations of physicians to “recognize torture, treat it, and Report it” [67]. The focus on the education of the younger generation would help reduce the number of doctors who are unanimously considered to be at risk of complicity in torture.

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